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No. 330.

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

TWIN CITY PIPE LINE COMPANY AND INDUSTRIAL OIL AND GAS COMPANY,
PETITIONERS,

VS.

HARDING GLASS COMPANY, RESPONDENT.

## BRIEF OF RESPONDENT.

JOSEPH B. BROWN,
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## BRIEF OF RESPONDENT.

### STATEMENT OF THE CASE.

The respondent contends that the statement of the case made by counsel for the petitioners is incomplete and that said statement omits important facts which throw light upon the tendency of the contract in controversy. The additional facts tend to show that the contract stifles competition.

The evidence is voluminous, made so by the many documents introduced by the petitioners, which docu-

ments extend from page 20 to page 143 of the record. These documents include the complaints, demurrers, answers, District Court opinions in the three cases which were consolidated and tried in the Federal Court under No. 448, and another case (R. 190-211).

The respondent (R. 218) located its business and plant for the manufacture of window glass at Fort Smith (R. 224) in December, 1917. It located at that place because of the discovery of a great gas field in Crawford County, Arkansas, near Fort Smith. The discovery of such a gas field always attracts manufacturers using gas as a fuel. This one was no exception to the rule. Said manufacturers were offered gas at four cents (*Clear Creek Oil & Gas Co.* v. *Fort Smith Spelter Co.*, 148 Ark. 260; *Fort Smith Spelter Co.* v. *Clear Creek Oil & Gas Co.*, 267 U. S. 231). In all such fields the gas at first is usually developed by sharply competing companies. As the gas field grows and becomes more important the earlier companies sell out and the gas falls into the control of the larger companies, and the price is usually increased. The gas field under consideration (see the evidence of A. G. Williams, Jr., General Manager of petitioners, pp. 169, 170, 171, 172, 173, 174, 180), was developed by three separate interests. A great field of gas was discovered a short distance east of Fort Smith, in Crawford County. The Clear Creek Oil and Gas Company brought in the first wells. That company was a producing company as well as a transportation company and distributing company, and it was a public utility. Another interest was represented by the Crowe Oil

and Gas Company, which was a producing company, and its associate, the LaSalle Oil and Gas Company, which was a transporting and distributing company. The next interest, making the third, was the Twin City Pipe Line Company and its then associate company, the Wild Cat Oil and Gas Company. The three companies were sharp competitors in the production, distribution and sale of gas. The Wild Cat Oil and Gas Company went out of business in 1919 (R. 172), and the petitioner, the Industrial Oil and Gas Company, was organized in March of that year. The petitioner, the Twin City Pipe Line Company, was organized in March 1916. The Twin City Pipe Line Company (R. 172) did not control wells or produce any gas. No contract is shown between that company and the Industrial Oil and Gas Company whereby the latter can be compelled to furnish gas to the Twin City Pipe Line Company. The competition between the three interests thus described lasted until the petitioners secured complete control and ownership of all gas fields in Crawford County. The Fort Smith Light and Traction Company (R. 173) had a distributing system within the cities of Fort Smith and Van Buren at the time of the making of the contract, and before, and said company owned pipe lines between the two cities. The LaSalle Oil and Gas Company owned pipe lines connecting Van Buren with the pipe lines of the Fort Smith Light and Traction Company, thus enabling the LaSalle Company to transport its gas to Fort Smith. The Clear Creek Oil and Gas Company owned pipe lines from the gas fields to Van Buren and, also, from

Van Buren to Fort Smith, and to South Fort Smith. The map following page 148 shows the location of these various pipe lines. The Twin City Pipe Line Company, one of the petitioners, owned pipe lines from the gas fields in Crawford County to Van Buren, and also into Fort Smith. The three interests, therefore, were competitors in the furnishing of gas in the two cities of Van Buren and Fort Smith, and their environs.

Prior to 1923 S. H. Hale was not interested in that gas field. Some time prior to July, 1923, the exact date not being given, S. H. Hale acquired all the gas rights, gas fields, transportation lines and property of the Crowe Oil and Gas Company, the LaSalle Oil and Gas Company, and the Clear Creek Oil and Gas Company; thereby coming into the possession of all the properties, gas fields and systems of two of the interests above described. That left in the field two competitors, the Hale Companies and the petitioner. Hale soon began an active development of the properties, and developed an additional great gas field at Alma. Hale, finding himself in possession of a great supply of gas, began active competition for furnishing said gas to the consumers in Fort Smith and its environs. In July, 1923 (R. 93, 133, 134), said Hale entered into a ten-year contract with the Fort Smith Light and Traction Company to supply that company with gas at ten cents; under certain conditions at twelve and a half cents (R. 135, 136). That contract was made under the name of the LaSalle Oil and Gas Company. Soon after the making of that contract said Hale succeeded, in pushing his competition against petitioners, in mak-

ing a contract with the respondent on the 6th day of October, 1923 (R. 30, 240). In that contract Hale agreed to sell, and the respondent agreed to buy all of the respondent's requirements of gas for the five years ending October 30, 1928. Hale was enabled to make this contract by offering the gas at a lower price, which was ten cents. Hale thus in a short time, by reason of a great supply of gas and a lower price, succeeded in taking away from the petitioners two important customers.

Within a week after the contract between Hale and the respondent (see District Court's opinion p. 131), the petitioners entered into a contract with Hale and his corporations, whereby petitioners bought all the gas properties of Hale and took over and assumed all the contracts of Hale, including Hale's contract to furnish respondent with gas for five years at ten cents.

There was another person with gas holdings in the said gas fields. G. T. Cazort, a large land owner in Crawford County, had developed a considerable quantity of gas (R. 20, 170). That gas prior to January 20, 1925, was held under a short time contract by Hale and the petitioners. That contract would expire in about a year (R. 170). On the date last named the petitioner, the Industrial Oil and Gas Company, acquired an extension of its rights on the Cazort gas. Within four days (R. 220) after the Industrial Oil and Gas Company, the petitioner, thus secured the Cazort gas, the Twin City Pipe Line Company (and not the Industrial Oil and Gas Company, which had bought the Cazort gas), through its Superintendent,

notified the respondent that said petitioners would no longer furnish gas to the respondent at *the ten cent rate,* and that on and after February 1, 1925, the respondent would be billed at the city rate of *fifteen cents* (R. 222). From the time of the purchase of the Hale interests and the assumption of the Hale contract by respondent until that date (January 24, 1925), the Twin City Pipe Line Company furnished gas to the respondent, at the Hale contract rate of ten cents. In the letter (R. 220) the petitioner, the Twin City, contended that Hale contracted to furnish respondent with gas from one well only. *Hale's contract is not so worded* (R. 240). Said letter also claims that it is the intention of the petitioner "to carry out the contract." The letter, however, contradicts that assertion by stating that from February 1, 1925, gas will be charged at the *fifteen cent* rate. The respondent insisted that the Hale contract was valid and that petitioners had assumed its obligations, and that the respondent was entitled to ten cent gas for the period named. The Twin City sent bills to the respondent at the fifteen cent rate and the respondent paid the bills at the ten cent rate. The petitioner, the Twin City, in order to get rid of the ten cent rate and to collect the difference between that rate and the city rate, brought suit No. 1192 (R. 23) and also suit No. 1200 (R. 47). The first suit was brought in the State Court and removed by the respondent to the Federal Court. In the meantime the respondent had brought a suit in the Federal Court known as 448, seeking to compel Hale and the petitioners to comply with the Hale con-

tract and to furnish gas at ten cents for the five years. The suits brought by the Twin City were finally consolidated by stipulation after the District Court had denied respondent's motion to transfer said causes to the equity docket, and consolidated them with its suit 448. *The respondent in said suit* 448 *won its contention that the Hale contract was valid and that it was entitled to ten cent gas.* The petitioners alleged in that litigation that said contract (R. 77, 78, 79) was void. They admitted that they had adopted the contract, but claimed that they were not bound by it because it was void. The District Court in that case relieved the Twin City Pipe Line Company of the obligation of that contract because it was a public utility. The court held that said contract was a valid contract, however, and rendered a judgment against *Hale* in favor of the respondent for the sum named in the judgment of the Twin City against the respondent. The same decree also gave Hale a judgment over against the Industrial Oil and Gas Company. Hale, the respondent, and the Industrial Oil and Gas Company all appealed from that decree. After the appeal was lodged in the Court of Appeals of the Eighth Circuit the parties to that litigation settled the matters involved in that litigation. *There was not,* however, involved in that litigation any question as to an *exclusive contract* between respondent and the Twin City Pipe Line Company as to the taking of gas. The respondent (R. 30), from 1916 to the making of the Hale contract, had taken all its requirements of gas from the Twin City Pipe Line Company without any contract whatever. The Twin

City, in the discharge of its duty as a public utility, furnished that gas without a contract.

The respondent had contended in the litigation, and that was one of the purposes of the suit, that the Twin City Pipe Line Company, by using an insufficient pipe as a service pipe, discriminated against the respondent in the furnishing of gas, and further contended that as a result of that discrimination the respondent, in the winter of 1924-1925, suffered a shortage of gas and suffered a loss (R. 225) in excess of $50,000.00, which it did not recover. Immediately after the winter of 1924-1925, stockholders of the respondents, and others, began efforts to develop a gas field just across the river from Fort Smith, in the State of Oklahoma. That was made necessary, as respondent believed, because of the threatened raise of the price of gas by the petitioner, the Twin City, and because the respondent could not pay more for its gas than it was paying, and meet its competition and retain its plant in Fort Smith. The respondent had been offered cheaper gas at other cities, but preferred to remain in Fort Smith provided it could secure the necessary fuel gas. For that reason the officers of the respondent with others began the developments to secure its own supply of gas, which developments were successful. The officers of the respondent, and other interested citizens, united in the organization of the Citizens Gas Company for the purpose of that development, which company was organized March, 1926 (R. 239), many months before the contract in controversy was entered into. The develop-

ments began before said organization in the summer of 1925 (R. 226).

After the present suit was brought, and for the purpose of defeating the efforts of the respondent to secure a supply of gas, the petitioner, the Twin City Pipe Line Company (R. 190-201), brought a suit in the State Court to enjoin the Citizens Pipe Line Company, which, together with the Citizens Gas Company, had invested nearly $100,000.00 to secure a supply of gas for the respondent, from laying its pipe line along Johnson Street and to the plant of the Harding Glass Company in Fort Smith. That suit was brought after the present suit was brought. The Supreme Court held that that suit was without merit and dismissed it. The pleadings, and even the opinion of the Supreme Court in that case, were introduced as testimony by petitioners in this case (R. 190-211).

The transactions above set forth left the petitioners in control of substantially all the gas produced in Crawford County, and left outstanding the Gans gas which was developed by Hale and which was located some fifteen or twenty miles west of Fort Smith, in Oklahoma. There was also a small quantity of gas produced by the Fort Smith Light and Traction Company. Before this case was tried the petitioners purchased from Hale the Gans gas. That was a deal made between two individuals, as petitioners' evidence showed. Respondent endeavored to secure that contract. It was not produced, and the District Court sustained petitioners' objection to the production of the same (R. 175-176). About that time the Fort Smith

Gas Company was organized by the petitioners for the purpose of taking over all gas interests and distributing systems of the Fort Smith Light and Traction Company. Therefore, at the time of the trial the petitioners were the owners of substantially all gas supplies except the gas of the Citizens Pipe Line Company and the Orr gas, which is the gas of the LeFlore County Gas and Electric Company. The fields of that company are located about twenty-five miles southwest of Fort Smith, and a pipe line runs from those fields to a point in Oklahoma near Fort Smith.

**Consideration of the Contract.**

Petitioners claim that the contract was supported by the construction of an eight inch pipe line at a cost of $4,489.82. As a matter of truth the petitioners made a handsome profit out of the deal whereby the Twin City obligated itself to build the eight inch pipe. As before stated, the respondent claimed that it was the duty of the petitioner, the Twin City, under the Arkansas statute (for said statute see District Court's Opinion, p. 141) to furnish a sufficient pipe. Respondent offered to pay the expense of that (R. 89). The respondent offered to prove (R. 219) that the President of the petitioners who prepared the contract and brought it to the respondent for signing, stated that the Twin City would do better than was agreed to in the negotiations. The Superintendent of the petitioners admitted (R. 185-186) that said eight inch pipe was some benefit to the petitioners. By looking at the map following page 148 it is clear that said eight inch pipe

is a benefit. It connects the ten inch pipe which comes from the gas fields with the eight inch pipe, and enables the petitioner, the Twin City, to furnish gas in the event of a breakdown of either pipe by bringing the gas over the other pipe.

The respondent, as to the consideration, claims that the undisputed evidence in the record shows that the Twin City Pipe Line Company made a profit of $41,419.99. The petitioners introduced evidence showing the amount of gas consumed by the respondent (R. 160) for the five year period ending October 30, 1928. By getting rid of the ten cent rate in the contract under consideration the additional profit over the ten cent rate, by collecting on the city rate, amounts to $45,909.81. The Twin City claims that it spent in the construction of the eight inch pipe $4,489.82; therefore, the petitioner, the Twin City, made a net profit of $41,419.99.

The petitioners further claim that the Twin City satisfied the judgment of $17,155.46. That was a judgment against the respondent for that sum. The respondent, however, had a judgment over against Hale for the same sum and Hale had a judgment over against the petitioner, the Industrial Oil and Gas Company, for the same sum; therefore, the Twin City lost nothing in satisfying that judgment, and made a net profit of $41,419.99.

## ARGUMENT.

The respondent will discuss the points raised in petitioners' brief in the order therein set out.

### POINT ONE.

**THE DECISION OF THE COURT OF APPEALS OF THE EIGHTH CIRCUIT IN THIS CAUSE IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL ON THE SAME MATTER.**

Counsel for the petitioner argue that the decision of the Circuit Court of Appeals of the Eighth Circuit is in conflict with the decision of the Circuit Court of Appeals of the Tenth Circuit on the same matter, and in support of their contention cite the case of *Griffin et al.* v. *Oklahoma Natural Gas Corporation,* 37 Fed. (2d) 545. Counsel for petitioners (Brief p. 10) claim that the Oklahoma Natural Gas Corporation was a public utility. They are not supported in that contention by the facts in that case. The contract in that case was made by the City of Iola, Kansas, and the J. B. Kirk Gas & Smelting Company, which company was not a public utility. That company assigned the contract to the Oklahoma Natural Gas Corporation and there is nothing in the report of the case to show that that corporation was a public utility. In showing that the Oklahoma Natural Gas Corporation was not a public utility, the Court of Appeals of the Tenth Circuit in that case said: "The Oklahoma Corporation had no franchise and could not dispose of such gas at retail at Iola." Besides, the court in that case expressly stated that the City "was the

only customer for such gas at Iola." It therefore appears positively that the gas corporation, as to that contract, was not a public utility and was not acting as such. The City of Iola, in making the contract, was acting in its business or proprietary capacity and not as a governmental agency. In 1927, said City of Iola entered into a contract with the J. B. Kirk Gas & Smelting Company by which said Company agreed to sell and deliver to the City, and the City agreed to buy, all the natural gas required by the City for fuel in the operation of its electric light and water works power plant. The City agreed to buy, for the five years, all its fuel from said Company. The grantee in said ordinance failed to give satisfactory service, and finally assigned its rights under the contract to the Oklahoma Natural Gas Corporation. When said corporation took over the properties it made a survey and expended the sum of $310,000.00 in additions and betterments for the purpose of assuring a gas supply to the City. After the assignment of said contract to said corporation, one Griffin, a former employee of the Oklahoma Corporation, entered into a contract with the City by which he agreed to sell natural gas to the City for one year. The District Court enjoined Griffin and the City from carrying out said last named contract. On appeal the City and Griffin contended that the City was without power to make the contract for more than a year. The court denied that contention, and held that the contract was valid "if the period of their duration is a reasonable one under the existing facts and circumstances." The court held that the

period of five years was a reasonable one, and denied the City's contention. It was further contended by the City and Griffin that the contracts were "void because in restraint of trade." The court held that if the restraint was reasonable, under the particular facts and circumstances, the contracts were not invalid because of such restraint of trade. The court, therefore, did not decide the case upon the theory that either party thereto was a public service corporation. The Oklahoma Natural Gas Corporation was not at the time obligated by any public duty to furnish the gas to the City as a customer. No such duty existed, under the law, either from the predecessor of such corporation or from the corporation itself. Hence that case did not turn upon the fact that either party to the contract was a public utility. That seems clear. The case, therefore, was one between two corporations engaged in private business of buying and selling gas. In holding that the City of Iola was acting as a business corporation, the Court of Appeals of the Tenth Circuit cited the well known case from the Eighth Circuit, *Ill. T. & S. Bank* v. *Arkansas City*, (C. C. A. 8) 76 Fed. 271. The said court, therefore, correctly held, under those facts, that the expenditure of money by the Oklahoma Corporation "and the fact that the City was the only customer for such gas at Iola, an exclusive contract for a period of five years was reasonable." It seems clear, therefore, that said case did not turn upon partial restraint of trade by a *public utility* in making a contract with its *customer*, to perform a duty which it is obligated to perform, under the law, on condition

that the customer bind itself to take all of its requirements from said public utility.

Passing for the present petitioner's discussion of a subsidiary question on pages 12 and 13 of its brief, we will notice the case of *Montgomery Traction Company* v. *Montgomery Light & Water Power Company*, 229 Fed. 672, which case, petitioner claims, is in conflict with the decision of the Court of Appeals of the Eighth Circuit in the instant case. That case involved the construction of a contract whereby the Light and Power Company agreed to sell, and the Traction Company agreed to buy, electricity for the operation of the street cars for a period of fifteen years. For that period said contract was exclusive. The electricity was purchased for propelling, lighting, and heating the Traction Company's passenger and freight cars. Said case first appears in 191 Fed. 657. The case was submitted to the district judge on a demurrer to the complaint. That opinion recites that the Power Company is a *quasi* public corporation, engaged in generating and supplying electrical current for lighting and power purposes to individuals and the public; and further recites that the Traction Company is another *quasi* public corporation engaged in the street car business. Eight years of the contract had expired. In order to be able to furnish the additional electrical power to the Traction Company, the Power Company expended $200,000.00 in machinery and apparatus. The Traction Company (page 661) contended a court of equity would not compel the specific performance of such contract extending over a period of years. The

Traction Company further contended that the court could not compel specific performance, because the parties might terminate the contract before its expiration. Other contentions were made, such as lack of mutuality and other matters. It does not appear, however, that the specific question involved here was raised or decided in that opinion. The principal question on which the court's decision on the demurrer turned was that of whether specific performance could be enforced, which question assumed the validity of the contract.

Said case next appears in 219 Fed. 963. That was a decision on the merits after trial. It was contended by the Traction Company there that said contract was against public policy because it delegated a part of the duty of the Traction Company to the public to another corporation, the Power Company. Using the language of the court the Traction Company's contention is, "the contention is that the respondent is a public service corporation and is bound by its charter to serve the public as a common carrier of passengers; that the contract between the respondent and the complainant, the basis of this suit, is an attempt to surrender or delegate the duties imposed upon respondent to another; and that therefore the contract is against public policy and void." It will, therefore, be observed that the Traction Company, in that case, made no contention that the contract was void on the ground on which the Court of Appeals, in the instant case, held the contract in controversy void. Hence in that case it was not contended or decided that a public utility, being obligated to furnish gas or electricity to all alike, would have the

right to require of a customer an obligation to take all the customer's requirements from the public utility. In upholding said electrical contract against the contention made by the Traction Company the District Court said:

> "On the contrary, it is evident that such contract merely provided a means by which respondent was to perform the duty imposed upon it by its charter and the discharge of which it owed the public."

Neither in the Griffin case nor the Montgomery case did there exist a duty on the part of the public utility to furnish gas or service to a consumer. The purchaser in each case, without a contract, had no right to demand the service from the sellers. The Montgomery case next appeared in 229 Fed. 672, where it appears said case was considered by the Court of Appeals of the Fifth Circuit. Said Court of Appeals of the Fifth Circuit did not in any manner refer to, consider, or discuss the principle of law decided by the Court of Appeals in the instant case. Apparently, the Traction Company relied in the Court of Appeals more upon the *lack of mutuality* of remedy than anything else. The Court of Appeals held that the Traction Company would not suffer by reason of any lack of mutuality in said contract. Therefore, in the said cause on appeal, there were only three questions discussed. First, whether a foreign corporation could make a contract without complying with the laws of the State. In that the court held that the corporation had adopted the contract after it had complied with state

law. The second question was whether there was mutuality of obligation. The court decided that, as stated above. The third question was whether the specific performance of the contract could be compelled in equity.

**If the Griffin Case Has the Meaning Given It by Counsel for the Petitioners, Said Case Is in Conflict With the Public Policy of the State of Kansas as Shown by Its Decisions and Statutes.**

*The Keene Syndicate* v. *The Wichita Gas, Electric Light and Power Company,* 69 Kans. 284. The Supreme Court of Kansas, in holding the contract in that case invalid, used this language:

> "The inquiry should be whether the agreement, which, in its necessary or contemplated operation upon the actions of the party to it, tends to restrain their natural rivalry and competition, and thus to result in the disadvantage of the public or of third parties, is against the principles of sound public policy, and consequently void."

The contract involved in that Kansas case was one leasing to a rival corporation for a period of ten years machinery and appliances used in generating electricity, the seller obligating himself not to engage in the business of furnishing electric light and power to the public during that period. The Kansas court cited the case of *Western Wooden-ware Ass'n* v. *Starkey,* 84 Mich. 76, and *Gibbs* v. *Consolidated Gas Company,* 130 U. S. 396. We refer in that opinion also to the case of *Hutchinson Gas & Fuel Company* v. *Wichita Natural Gas Company,* (8th Cir.) 267 Fed. 35.

The contract in that case, as originally written, was an exclusive contract, and was held void in that form as it tended to establish a monopoly. Before the contract came into the courts the parties changed the same so as to remove the exclusive void features. The suit, in that case, was brought by the Hutchinson Company, a distributing company, to enjoin the Wichita Company, a natural gas producing company, from raising its rate for the sale of its gas, and from ceasing to supply the gas at a rate specified in the contract. The lower court refused to enforce the contract by injunction, and that decision was affirmed on appeal.

**If the Montgomery Case in the Fifth Circuit, Above Referred to, Has the Meaning Given It by Counsel for the Petitioners Then Said Decision Is in Conflict With the Decisions of the Supreme Court of Alabama on the Subject of the Invalidity of Contracts as Being Against the Public Policy of that State.**

The following Alabama cases hold that contracts like the one in controversy tend to establish a monopoly, and are, therefore, against public interest, and are void as against public policy.

*American Laundry Co.* v. *E. & W. Dry Cleaning Co.*, 199 Ala. 154; 74 So. 58.
*Arnold* v. *Jones Cotton Co.*, 152 Ala. 501.
*Tuscaloosa Ice Mfg. Co.* v. *Williams*, 127 Ala. 110.
*Georgia Fruit Exchange* v. *Turnipseed*, 9 Ala. App. 123.

It is respectfully submitted that for the court to follow the cases from the Fifth and Tenth Circuits, above discussed, would be the establishment of a public policy in the State of Arkansas, which would be in

conflict with the constitution and laws and decisions of said State of Arkansas. That question is more fully discussed under Points Two and Three.

It is respectfully submitted that the decisions of other Circuit Courts of Appeal are in line with the decision of the Eighth Circuit on the question involved herein.

Without comment, we refer to the following cases, which we think sustain respondent's contention on this point:

*Oceanic Steam Nav. Co.* v. *Corcoran* (2d Cir.), 9 Fed. (2d) 724.

*Hubbard Ayer Inc.* v. *Federal Transportation Co.*, (2d Cir.), 15 Fed. (2d) 274.

*Continental Candy Corp.* v. *California & Hawaiian Sugar Refining Co.*, (D. C. Calif.), 270 Fed. 302.

*Davis* v. *Jointless Fire Brick Co.*, (9th Cir.) 300 Fed. 1.

*Sampliner* v. *Motion Picture Patent Co.*, (2d Cir.), 255 Fed. 242.

*B. V. D. Co.* v. *Isaac* (6th Cir.), 257 Fed. 709.

*Davis* v. *Southern Pacific Co.*, (D. C. Calif.) 235 Fed. 731.

*Waltham Watch Co.* v. *Keene*, 209 Fed. 1007.

*Western Union Telegraph Co.* v. *Postal Telegraph Co.*, (9th Cir.), 217 Fed. 533.

*Fox Solid Pressed Steel Co.* v. *Schoen Mfg. Co.*, (3d Cir.), 84 Fed. 544.

*Kellog Toasted Corn Flake Co.* v. *Buck*, (D. C. Calif.), 208 Fed. 383.

*Whitridge* v. *Mt. Vernon Woodberry Cotton Duck Co.*, (D. C.), 210 Fed. 302.

*Logan & Bryan Co.* v. *Postal Telegraph Co.*, (D. C.), 157 Fed. 570.

*Bailey & Graham* v. *Phillips*, (5th Cir.) 159 Fed. 535.

*C. M. & St. Paul Ry. Co.* v. *Wabash*, (8th Cir.), 61 Fed. 993.

## As a Matter of Law the Instant Contract on Its Face Tends to Create a Monopoly, and Is Therefore Void at Common Law.

The common law is the law of Arkansas. Crawford & Moses Digest, Section 1432.

There was, as a matter of law, a duty imposed by law upon the Twin City Pipe Line Company, being a public utility to supply respondent with its needed gas without discrimination and upon the same terms as to all other consumers. The obligation in said contract compelling the respondent, a customer, to take from the Twin City Pipe Line Company, a public utility, all its requirements of gas during the life of the gas field creates, or tends to create, a monopoly. Such a contract necessarily excludes from the field all other gas companies. In truth, therefore, this contract is in general restraint for trade instead of being merely in partial restraint of trade. The District Court below did not hold that the contract did not tend to establish a monopoly. The Court of Appeals did hold that said contract did tend to establish a monopoly.

Petitioners rely upon the case of *Shapard* v. *Lesser*, 127 Ark. 590. An examination of that case shows that said case is an authority against the contention of the petitioners. The effect of the agreement in that case was *to strifle competition*, which is the exact effect of the contract in the case at bar. Shapard and the Arkansas Cotton Oil Company entered into an agreement to erect and operate a cotton gin at Rondo, Arkansas. The Marianna Cotton Oil Company, having

a gin at that place, entered into a contract with Shapard for the purpose of preventing the establishment of the competitive mill at Rondo. The court held that the purpose of that agreement was to stifle competition and held the same therefor void as against public policy. The Arkansas court clearly distinguished the cases wherein parties have sold their business and obligated themselves for a reasonable time not to enter into the same business and the cases involving contracts which on their face showed that their effect was to stifle competition.

The Arkansas court used this language:

> "The avowed object of the contract, according to the allegations of the answer, was to stifle competition and to promote a monoply in the cotton seed business to the manifest injury of the public."

The said court cited some of the cases relied upon by the respondent herein. Other Arkansas cases along the same line are cited below under Point Three.

Pond on Public Utilities, Sections 205, 207.
6 Ruling Case Law, Section 204, page 803, and cases.
*Central New York T. & T. Co.* v. *Averill*, 199 N. Y. 128.
*Chicago Gas Light Co.* v. *Peoples Gas Light Co.*, 121 Ill. 530.

In the case of *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (afterwards considered by this court in 175 U. S. 211), Judge Taft, then circuit judge, said:

"But the sole object is to restrain trade in order to avoid the competition, *which has always been the policy of the common law* (italics ours) to foster."

It is therefore the respondent's contention that the contract under consideration on its face, as a matter of law, shows that it tends to establish a monopoly, and is therefore void.

However, because of the stress placed upon the matter by the petitioners, it is necessary to notice the decisions covering the point that a public utility cannot make a valid contract in any manner restraining trade. We will now under a separate paragraph discuss that question.

**Partial Restraint of Trade Will not be Tolerated in a Contract Between a Public Service Corporation and Its Customers.**

This is a subsidiary question to the one above discussed, but in our opinion, necessarily has its place in determining whether petitioners are entitled to the writ of certiorari in the instant case. A full discussion is essential because petitioners (Brief pp. 6 to 9) give it a great importance. In our opinion, the learned district court in this cause reached an erroneous result in part because of his misunderstanding the application of this doctrine to the instant case. The said court used this language:

"I do not think that the contract was in restraint of trade. If, however, it could be said to have had such an effect, it was only a partial restraint of trade."

From that language we are impressed with the view that said learned court was of the opinion that partial restraint of trade did not invalidate a contract when said contract was between a public service company and a customer. The common law of England was adopted by the State of Arkansas and is in force in that state.

Crawford and Moses' Digest, Section 1432.
*Horsley* v. *Hilburn*, 44 Ark. 458.
*Hardage* v. *Stroope*, 58 Ark. 303.

See the Arkansas Constitution, decisions and statutes cited under Point Three below.

In *Gibbs* v. *Consolidated Gas Company*, 130 U. S. 396, this court said:

> "* * * innumerable cases, however, might be cited to sustain the proposition that combinations among those engaged in business impressed with a public or *quasi* public character, which are manifestly prejudicial to the public interest, cannot be upheld."

It was the rule at common law, and the rule in Arkansas under common law, and we believe the rule everywhere, that a contract between a public utility and a customer, though only in partial restraint of trade, is yet absolutely void, because the public interest will not tolerate any kind of restraint in that respect by a public utility.

In 6 R. C. L., Section 204, page 803, the rule is thus declared:

> "The ordinary rule that contracts in partial or reasonable restraint of trade are not invalid,

does not apply to corporations engaged in a public business. In fact it may be said that if there is any sort of business which from its peculiar character can be restrained to no extent whatever without prejudice to the public interest, the courts would be compelled to hold void any contract imposing any restraint, however partial, on this peculiar business, provided, of course, it is shown clearly that the peculiar business thus attempted to be restrained is of such a character that any restraint upon it, however partial, must be regarded by the court as prejudicial to the public interest."

Many cases are cited in support of that doctrine, some of which are cited by the Court of Appeals of the Eighth Circuit in its opinion in this case (R. 256, 257, 258).

We think that rule is established by this court in the case of *Gibbs* v. *Consolidated Gas Company*, 130 U. S. 396. In that case, this court in substance stated that if the contract was forbidden by public policy, it was void. In the body of the opinion, this court, through Mr. Chief Justice Fuller, used this language:

> "Hence, while it is justly urged that those rules which say that a given contract is against public policy, should not be arbitrarily extended so as to interfere with the freedom of contract (*Printing Co.* v. *Sampson*, L. R. 19 Eq. 462), yet, in the instance of business of such character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy."

In support of that, this court cited in said opinion many authorities and we deem it unnecessary to review them here.

As to the public nature of the gas business, this court, in the Gibbs case, said:

> "The supplying of illuminating gas is a business of a public nature to meet a public necessity; and where such business cannot be restrained without prejudice to the public interest, contracts imposing such restraints, however partial, will not be enforced or sustained, because in contravention of public policy."

In Wyman on Public Service Corporations, Section 685, this language appears:

> "It is therefore idle for a public service company to attempt to ward off competition by entering into exclusive contracts for terms of years."

The same author, at Section 691, points out the very difference which the learned District Court failed to recognize. It is there said:

> "It is a safe principle to go by that no arrangement will be enforced by the courts whereby public service is hampered, even if such arrangements are generally supported where private business is involved."
>
> See *W. Va. Transport Co.* v. *Ohio River Pipe Line Co.*, 22 W. Va. 600.

We cite the following cases on the same point without comment:

*Gwynn* v. *Telephone Co.*, 69 So. C. 434; 48 S. E. 460.

*Salt Co.* v. *Guthrie*, 35 Ohio St. 672.

Pond on Public Utilities, Sections 205, 207 and cases cited.

*Central New York T. & T. Co.* v. *Averill*, 199 N. Y. 128.

*Amarillo Oil Co.* v. *Ranch Creek Gas Co.*, (Texas) 271 S. W. 145.

*Love* v. *Kozy Theatre Co.*, 193 Ky. 336.

It is the tendency of the contract which makes it void as against public policy.

*Reeves* v. *Decorah Farmers' Cooperative Society*, 160 Iowa 194.

*W. W. Montague & Co.* v. *Lowry*, 193 U. S. 38.

*Anderson* v. *Jett*, 89 Ky. 375.

*Chapin* v. *Brown Bros.*, 83 Iowa 156.

*Boutwell* v. *Marr*, 71 Vt. 1.

13 Corpus Juris, page 480, Section 423.

*Barrow* v. *McMurtry Mfg. Co.*, 54 Colo. 432.

*Anderson* v. *Shawnee Compress Co.*, 17 Okla. 231.

19 R. C. L. 36.

In Joyce on Monopolies, Section 92, page 119, the author says:

> "The rule that agreements in general restraint of trade are void while those in partial restraint when reasonable and founded upon a valid consideration are valid is declared to be not applicable to corporation engaged in a public business."

See also page 120, same book.

*Union Trust Co.* v. *Kinloch T. Co.*, 258 Ill. 202.

In *Sampliner* v. *Motion Picture Patent Co.*, 255 Fed. 242, the court said:

> "The question of whether a contract is void as contrary to public policy is determined by its general tendency, and if that is opposed to the

interests of the public, the contract is void, even though in the particular case the intent of the parties may have been good, and no injury to the public may have resulted."

This court, in the case of *Weil* v. *Neary;* 278 U. S. 160, said:

"An agreement against public policy is void even though the intent was good and no injury resulted."

Counsel for the petitioners criticise the decision in the case of *Coombs* v. *Burk,* 40 Cal. App. 8; 180 Pac. 59. It is claimed by said counsel that that case (Petitioner's Brief, page 23), has never been cited or approved by any other court except the court below. It is submitted that said counsel in that statement seriously erred. Said case of Coombs vs. Burk was cited with approval by the California Court in the case of *Fidelity Assurance Company* v. *Cosby,* 90 Cal. App. 25; 265 Pac. 372.

Besides, said case of Coombs vs. Burk has been cited by some of the ablest text writers, men known for their ability as law writers, such as Elliott on Contracts and Williston on Contracts.

Elliott on Contracts and new Supplement, Section 817.

In note 24, the author says:

"A contract by which a gas company agrees to install for a consumer certain appliances in consideration of the latter's agreement to purchase all gas used from the company or pay a certain sum is void," citing the case of Coombs vs. Burk.

The author in Section 817 cites the following cases:

*Arnold* v. *Jones Cotton Co.*, (Ala.) 12 L. R. A. (N. S.) 150, and note.

*Chicago, I. & L. Ry. Co.* v. *Southern Ind. Ry. Co.*, (Ind.) 70 N. E. 843.

In Williston on Contracts, Section 1645, the author states:

> "A contract to sell within a certain territory goods of a specified kind to or through the agency of one person only generally is valid; but it is otherwise if such a contract is part of a scheme whereby it is sought to establish a monopoly; or if freedom of dealing with a public service company is impaired, it will not be enforced," citing Coombs vs. Burk.

The cases heretofore cited, as well as Section 1645 of Williston on Contracts, show the difference between the two classes of contracts. As the court below well reasoned, such contracts tending to establish a monopoly are void because against public policy and in restraint of trade.

In support of the principles declared by the California court in said case of Coombs vs. Burk, it is believed that a number of cases from the Supreme Court of California sustain the rule announced by the Court of Appeals in the instant case.

See:

*Santa Clara Valley Mill & Lumber Co.* v. *Hayes*, 76 Calif. 387.

*Shasta County* v. *Moody*, (Calif.), 265 Pac. 1032.

In the case of *Tuscaloosa Ice Manufacturing Company* v. *Williams*, 127 Ala. 110, the court in holding a contract which stifled competition invalid said:

> "It tends to injure the public by stifling competition and creating a monopoly. Its manifest purpose, even upon its face, and certainly when taken in connection with the facts averred in the plea, was to secure to the covenantee a monopoly in the production and sale of ice in the Town of Tuscaloosa and vicinity, and such is its operation and effect."

See 13 Corpus Juris, pages 478 and 481, and cases there cited.

The Griffin, the Montgomery and the Fort Smith Light and Traction Company cases (94 Ark. 461), which latter case will be discussed under Point Three, belong to a different class of cases from the instant case. The theory upon which the contracts in the class of cases like those just mentioned are sustained, is that they are in the interest of the public and aid the public service corporation to serve the public. Such contracts do not conflict with public interest and do not tend to establish a monopoly. The petitioner owed a public duty to the respondent to furnish gas without discrimination upon the same terms that it furnished gas to all other consumers. A public utility owing the duty to supply gas to all alike cannot lawfully contract with one customer requiring that customer to take all his requirements from the public utility. If the utility can require that of one, it can require it of all. If it can require it of all, it establishes a monopoly to the injury of the public and

against the Constitution and Laws of the State of Arkansas.

**The Alleged Consideration in the Contract Is Immaterial and Does Not Make the Contract Valid.**

This question is discussed under Point One of petitioner's brief beginning on page 12. The rule is universal that a good and valuable consideration will not support a contract which is void because against public policy.

6 Ruling Case Law, Section 14, page 707 and cases.
6 Ruling Case Law, Section 204, page 803 and cases.
6 Ruling Case Law, Section 214, page 814 and cases.
13 Corpus Juris, pages 478 to 481, and cases.

Upon the facts in this record established by the evidence of the petitioner itself, there is no basis for the argument that the settlement of the then pending litigation was a consideration moving from the petitioners to the respondent. The principal purpose of that litigation, as is shown by the complaints and answers of the respondent, was to establish the respondent's right to gas at the price of ten cents for five years ending October 30, 1928. A brief reference to the pleadings which were introduced by the petitioner will make this contention clear.

The petitioner, the Twin City Pipe Line Company (R. 23), brought two suits in the state court seeking judgment for the difference between the city rate and the ten cent rate of the Hale contract. The respond-

ent (R. 26-29) removed those cases to the United States District Court. The respondent (R. 29) in that court filed an answer setting up equitable defenses and asserting its right as against the Twin City Pipe Line Company under the Hale contract to have gas furnished it by the Twin City Pipe Line Company for the five year period named under the Hale contract. The Hale contract (R. 30-33) plainly obligated said Hale to furnish to the respondent all its requirements of gas for its plant at ten cents for the period ending October 30, 1928. The District Court at first denied the motion of the respondent to transfer the case to equity. Later (R. 44) by stipulation the case was transferred to equity and Hale was made a party. One week after the making of said contract between Hale and the respondent (R. 131) the petitioners, evidently fearing the competition of Hale and his gas companies, by a contract in writing purchased from Hale and his companies all their gas wells, pipe lines, distribution systems and gas rights, and assumed the liabilities of the contracts of Hale including the one with the respondent. The Hale contract was specifically named in the purchase by the petitioners of the interests of Hale. The petitioners in their contract of purchase from Hale and his corporations (R. 133) bound themselves to hold Hale harmless from any judgment that the respondent might secure against Hale for any breach of Hale's contract to furnish the ten cent gas for the full term of said contract (R. 133). The petitioners reserved the right to defend any litigation brought by the respondent against Hale, and

assumed all responsibility and liability that might result from any such litigation, and expressly provided that they should have the right to conduct the litigation "without interference by said Hale." The suits by the petitioner, the Twin City Pipe Line Company, disregarded the solemn obligation of said company and the Industrial Oil and Gas Company to furnish the gas at ten cents, and based their alleged right of recovery upon the higher rate which had been fixed by the City Commission of the City of Fort Smith. The respondent at all times paid the amount due under the contract with Hale and insisted that the petitioners had assumed Hale's obligation to furnish the ten cent gas for the five years. The pleadings of the petitioners in that litigation (R. 77, 78, 79) show that one of the principal contentions of petitioners was the invalidity of the contract of petitioners to furnish gas at ten cents.

The petitioners at the trial introduced a table showing the quantity of gas consumed by the respondent covering the period of the Hale contract from October 30, 1925, to October 30, 1928. The difference between the price of that gas at the city rate of fifteen cents and at the contract rate between petitioners and respondent of ten cents amounts to the sum of $45,909.81. That sum is arrived at by the figures given by the general manager of the petitioners (R. 153-157). Therefore, it was worth to the petitioner, the Twin City Pipe Line Company, to destroy the Hale ten cent contract the sum of $45,909.81.

The Industrial Oil and Gas Company and S. H. Hale, and the respondent appealed from the decree. The appeal of the Industrial Oil and Gas Company raised for it the question of its obligation to pay to Hale all damages due to the respondent for the breach of the Hale contract and the liability of the Industrial Oil and Gas Company thereunder. It will, therefore, be observed that *the respondent had won its suit to establish its right to the ten cent rate and that the winning of that suit was worth the sum above named.* Evidently to get rid of that ten cent gas contract it was of interest to the Twin City Pipe Line Company to settle the case. The president of the petitioners (R. 179 and 183), therefore, prepared the contract in controversy and it was signed by all parties.

The petitioner, the Twin City Pipe Line Company, at an expense of $4,489.82 (R. 147) installed the eight inch pipe extending from the eight inch pipe on the north of the Harding plant to the ten inch pipe on the south, although the Harding Company had contended for one connection only. Therefore, by settling the litigation the respondent lost $41,419.99, which is the difference between the $45,909.81 and the cost of installing the eight inch pipe; and the petitioner, the Twin City Pipe Line Company, thereby reaped a profit of that sum of $41,419.99. Hence there is no merit in the contention that the cost of the eight inch pipe was a consideration moving from petitioner, Twin City Pipe Line Company, to the respondent.

But petitioners contend that the Twin City Pipe Line Company satisfied a judgment it recovered in

Cause 448, which judgment amounted to the sum of $17,155.46. That statement does not give the whole truth. The whole truth is that the Twin City Pipe Line Company in that suit secured a judgment against the Harding Glass Company for that amount and the Harding Glass Company secured a judgment against S. H. Hale for the same amount, and S. H. Hale secured a judgment over against the Industrial Oil and Gas Company, one of the petitioners, for the same amount. As the petitioners are in substance and effect one and the same in interest, the result is that the Twin City Pipe Line Company secured a judgment in effect against itself for the amount named, and it satisfied that judgment. Those facts furnish no consideration for that part of the contract in controversy which binds the respondent to take for all time all its gas from the Twin City Pipe Line Company.

It is, therefore, respectfully submitted that there is no merit in the contention that the clause of the contract under discussion is supported by a consideration.

## POINT TWO.

**THE DECISION OF THE COURT OF APPEALS DOES NOT DECIDE THE QUESTION INVOLVED IN A WAY THAT IS UNTENABLE AND IN CONFLICT WITH THE WEIGHT OF AUTHORITY.**

Counsel for the petitioners, by their argument, attempt to convert this contract into a so-called "requirements" contract and then argue that all "requirements" contracts are valid. There is no more sacredness in "requirements" contracts than in any other. If a "requirements" contract violates the public policy of the state where it is made, such a contract falls be-

cause in violation of public policy, in the same manner that all other contracts in violation of public policy must fall. We have carefully examined the numerous cases cited by counsel for petitioners on pages 16 and 17 of their brief, and, in our opinion, not a single one of those cases discusses or decides adversely to the respondent the prime question here involved. Therefore, it will be necessary to notice only a very few of said cases.

Of the case of *Lone Star Gas Co.* v. *Municipal Gas Co.*, 117 Texas 331; 3 S. W. (2d) 790, counsel for the petitioners state that both companies were public utilities, and then say that the contract was held valid. An examination of the case shows that the contract was not held valid. The Texas court did not decree a specific performance of said contract. The clause in the contract giving one gas company a right to forfeit the contract was held invalid. The *ground* upon which the court decreed that the companies should continue to supply the gas *was that said companies owed a duty to the public.* The decision was therefore grounded on a duty that each company owed to the public. The court used this language:

> "Plaintiff in error's relation to these contracts, and through them to the consumers, together with its pipe line systems, and defendant in error's distributing systems, fixes its public duties and obligations in the premises, and makes active and applicable the principle of public policy that as a penalty, this right of forfeiture clause in the contracts cannot be invoked, but is unenforceable and void."

The court thereupon adopted the view of the Court of Civil Appeals, which resulted in compelling the two companies, because of a duty which they owed the public, to continue their supply of gas. The principle underlying the decision is at war with the contention of counsel for the petitioners.

Again counsel for petitioners rely upon the case of *Home Gas Co.* v. *Mannington Co-Operative Window Glass Co.*, 63 W. Va. 266; 61 S. E. 329, and claim that that case is in point. We respectfully submit that the question under consideration here was neither discussed nor decided in that case. It is also contended by counsel for petitioners that that case together with the case of *Elk Refining Co.* v. *Falling Rock Cannel Coal Co.*, 92 W. Va. 479, uphold so-called "requirements" contracts covering a gas supply. Neither of those cases, in our opinion, discusses the point under consideration and there is no West Virginia case which we have found, which changes the rule in the case of *West Virginia T. Co.* v. *Ohio River P. L. Co.*, 22 W. Va. 600.

The same counsel (Brief p. 20) also say that the case of *Albany Power & Mfg. Co.* v. *City of Albany*, 133 Ga. 375; 65 S. E. 886, presents "the same question involved in the case at bar." We have examined that case and do not find that the question here involved was discussed or decided. On the other hand, cases from Georgia elsewhere cited in this brief are to the contrary.

Counsel for petitioner also rely upon the case of *Cox, Inc.* v. *Humble Oil & Refining Co.*, (Texas) 16

S. W. (2d) 285. No question arose in that case of a public utility making an exclusive contract with one of its customers. Neither of the parties was a public utility.

It is argued by petitioners (Brief pp. 21-23) that the decision of the Court of Appeals is in direct conflict with the weight of authority "on the question of the validity of requirements contracts." It is also said that said decision announces a new doctrine applicable only to one class of requirements contracts—"the requirements contracts of a public utility." We have attempted to show that the obligations of a public utility to the public require the same service to every member of the public and that exclusive contracts between a public utility and one of its customers are condemned by the common law, and that that rule is as old as the common law itself.

It is also argued (Brief p. 22) that if such contracts are held against public policy, the customer is left free to abandon at any time the use of the investment in plant and line capacity or the development of gas producing territory. That argument attacks the soundness of the law of public policy as embodied in the common law of Arkansas and of other states. It is asserted as a part of that argument that there was a development of gas producing territory "made specially to serve" respondent. It is difficult to understand how a public service utility, like the Twin City Pipe Line Company, which made its investment in 1916 and furnished the respondent gas until the fall of 1923 *without any contract*, could claim that a public utility

of that kind had made its investment upon the theory *that every consumer of gas, as a matter of law, is compelled to take its gas from the petitioners.*. It is argued that the loss of a large customer will cripple the utility "in its ability to serve properly the general public." If the said petitioner cannot serve the general public as well as another public utility, then the other public utility, as a matter of justice to the public, is entitled to take the business. That is illustrated by the contract between the LaSalle Oil & Gas Company and the Fort Smith Light & Traction Company, which took away from the petitioner the business of the Fort Smith Light & Traction Company. Hale, through his company, was enabled to furnish the Fort Smith Light & Traction Company with gas at ten cents. By reason of that he got a ten-year contract with the Fort Smith Light & Traction Company. In the same way Hale offered to the respondent ten cent gas for five years, and thereby succeeded in taking away from the petitioner, the Twin City Pipe Line Company, the respondent, as a customer. We have found no law, under constitutions and laws like those of Arkansas, where any court has ever held that there is a legal obligation upon any customer of a public utility to take from the public utility its gas during the life of the gas field.

It is urged (Brief p. 23) that the Twin City Pipe Line Company did not agree not to sell gas to others. Being a public utility, it could not so agree. The contract is not void because the Twin City Pipe Line Company entered into an agreement, the result of which would be to cripple its business and relieve it from

any duty to the public. That is not the question. It is also urged that the respondent did not agree that it would not build other plants, and counsel refer to the agreement as applying only to "existing" plants. The word "existing" does not appear in the contract. There is a mistake in the contract as it appears at page 12 of the record. The fourth paragraph, the one on which this suit is based, as there printed has an omission. The said contract, however, appears correctly in the record at page 144 and said contract appears correctly in petitioners' brief beginning on page 4, except that that copy does not show that the contract was on the letterhead of the Twin City Pipe Line Company (see R. 12).

Counsel for petitioners also rely upon the case of *Bald Eagle Valley R. Co.* v. *Nittany Valley R. Co.*, 171 Pa. 284. The Court of Appeals as to that case said that it might be taken as a decision on the public policy of the State of Pennsylvania. We think said case is not in point for an additional reason. The Pennsylvania court, in holding the contract there involved valid, said:

> "It is not in restraint of trade, for its expressed purpose and necessary effect are to increase both trade and population."

Hence that court did not discuss or decide the question here involved. It is not believed that said case can be sound law under the authority of *United States* v. *Reading Co.*, 226 U. S. 324. It is also respectfully submitted that under the Arkansas cases and

constitution cited under Point Three, said Pennsylvania case cannot apply.

*Kizer* v. *Texarkana & Ft. Smith Ry. Co.*, 66 Ark. 348.

*Yancey* v. *Batesville Telephone Co.*, 81 Ark. 466.

We respectfully submit that the criticisms made by petitioners of the case of Coombs vs. Burk are fully answered by what we have said as to that case under Point One above.

## POINT THREE.

**THE DECISION OF THE COURT BELOW IS NOT IN CONFLICT WITH THE APPLICABLE LOCAL DECISIONS ON AN IMPORTANT QUESTION OF LOCAL LAW.**

Section 19 of Article 2 of the Constitution of Arkansas reads:

> "Perpetuities and monopolies are contrary to the genius of a republic, and shall not be allowed."

By Section 18 of the same article of the Arkansas Constitution, the General Assembly of Arkansas is prohibited from making any grant to any citizen or class of citizens of privileges or immunities which upon the same terms shall not belong equally to all citizens. In Section 29 of the same article appears this language:

> "That everything in this article is excepted out of the general powers of the government, and shall forever remain inviolate; and that all laws contrary thereto, or to the other provisions herein contained, shall be void."

Under those provisions of the Constitution, a monopoly is not permitted to exist. Therefore, under those provisions, any contract which tends to establish a monopoly is necessarily void as against the public policy of the common law, and is also void as against those sections of the Constitution.

In the case of *Levy Ex Parte* (1884), 43 Ark. 42, after quoting that section of the Constitution, the court used this language:

> "The monopolies which in England became so odious as to excite general opposition, and infuse a detestation which has been transmitted to the free States of America, were in the nature of exclusive privileges of trade, granted to favorites or purchasers from the crown, for the enrichment of individuals, at the cost of the public. They were supported by no considerations of public good. They enabled a few to oppress the community by undue charges for goods or services."

Under this point counsel for petitioners cite four cases which, in our opinion, are against the contention of the petitioners.

In the case of *Cap F. Bourland Ice Co. v. Franklin Utilities Co.*, 180 Ark. 770, the same arguments were made to uphold the act of the General Assembly there in question that are made in counsel's brief. Act 55 of the General Assembly of Arkansas of 1929 (Acts 1929, p. 110) attempted to empower the Railroad Commission of Arkansas, by Sections 5, 16 and 17, in effect to establish a monopoly in the ice business. The Arkansas court held those sections of said act invalid because in conflict with the Constitution of Arkansas. In effect the

court held that said sections tended to establish a monopoly and that they were, therefore, in conflict with the Constitution of the State; and further held that the legislature had no power to pass any law the effect of which would be to establish a monopoly and thereby defeat competition.

Counsel also rely upon the case of *Warmack* v. *Major Stave Co.*, 132 Ark. 173. In our opinion, the principles decided by the Supreme Court of Arkansas in that case condemn the contract in controversy. In that case, the Major Stave Company brought a suit against L. M. Warmack to compel him to furnish electric lights in accordance with the terms of a contract entered into by the said company and the predecessor of said Warmack. The lower court directed the specific performance of the contract. The Supreme Court held that error, citing cases. The Supreme Court did not grant the relief because of the contract, but granted it because of a duty owing by the public utility to furnish lights to all customers under similar circumstances. A question arose as to whether the contract amounted to a payment for the lights. The parties by their contract had arranged the method of paying for the electricity. The court upheld that portion of the contract. In concluding the court said:

> "From the views we have expressed it follows that the court should not have directed the specific performance of the contract, but was correct in granting a mandatory injunction to compel Warmack to again turn on the current at the plant of the Stave Company."

The case therefore holds in effect that the public utility must serve all alike. Therefore, the public utility cannot compel an exclusive contract.

Petitioners also rely upon the case of *Fort Smith Light & Traction Co.* v. *Kelley*, 94 Ark. 461. An examination of that case will prove that said case does not support the contention of the petitioners. That case did not involve a controversy between a public utility and a *customer*. Besides, in our opinion, said case is an authority against the contention of the petitioners. Kelley and the Mansfield Gas Company were owners of gas wells and pipe lines. Kelley secured a franchise to furnish natural gas to the inhabitants of Fort Smith. The Mansfield Gas Company constructed some of the lines in Fort Smith. Then and prior thereto the Fort Smith Light & Traction Company had a franchise to manufacture and sell artificial gas in Fort Smith. It was contended by Kelley that if the contract excluded Kelley from furnishing gas in Fort Smith for forty-nine years, such provision was in restraint of trade and competition, and against public policy and unenforceable. The contract did obligate Kelley to furnish gas for the life of the franchise. *That right, however, to furnish gas was not exclusive.* It was expressly provided in that contract that if gas should be offered to the Traction Company by other parties at a lower price, the Traction Company had the right to accept such other gas. It was that provision of said contract which relieved it from being void.

The court (p. 471) stated that it was the duty of the Traction Company "as a public service corporation to furnish gas to the inhabitants of the city whose franchise it held, as cheaply as it could be obtained by the legitimate prosecution of its business. Appellant and appellees must have known that they could not enter into a contract that would be contrary to the public interests. The supplying of gas under the ordinance *was a matter of public concern*, and in contracting with each other they had to consider what would be for the benefit of the public." That decision, therefore, clearly means that the public utility and Kelley could not agree that the public utility would buy from no other seller and they could not legally agree that the price should not be reduced.

The court then considered the provision in the Kelley contract which saved it from being void as against public policy. That provision is: "That the party of the second part (Traction Company) may contract for and purchase natural gas *from other parties* or corporations, when such parties or corporations will furnish, supply and deliver the same to the party of the second part at lower figures than the said parties of the first part will do." The court held that that provision was for the benefit of the appellant. That provision prevented the contract from being an exclusive one and left the public utility free to buy its gas from any person who would offer the same cheaper. Said contract therefore contained provisions showing that, as a matter of law, it did not stifle competition. It encouraged competition. The contract protected

competition in its very terms. Kelley had the right to meet the lower prices if he so elected. The court held that he could not refuse to meet the lower prices and then declare the contract void. As between the public utility and Kelley, the contract granted to the former the exclusive right to distribute gas in the City of Fort Smith and suburbs with the express provision that if gas was offered cheaper by competitors, the utility had the right to take it.

By reason of the above provisions, the court said:

> "The contract is not one in restraint of trade. It does not restrain appellees (Kelley) from supplying natural gas to the City of Fort Smith under the ordinance No. 634, so long as they are willing to meet a 'downward revision' of the prices of natural gas. The law prohibiting contracts in restraint of trade does not prevent one from making a contract by which he agrees to compete with others in the price of the commodity which he produces for the use of the public. One purpose of the law in prohibiting contracts in restraint of trade is *to encourage competition* and thereby lower the prices of services and commodities to the public."

In answer to the contention of Kelley that the contract did not tend to lower prices, the court said:

> "But that is its inevitable *tendency*, and, indeed, *was its effect* in this case. The price of gas to the consumer has been greatly reduced since appellant entered into the contract with the Arkansas Company. Appellant could never lower the price of gas to the consumer unless by the terms of the contract it had the right to purchase gas at a lower rate than was fixed by appellees. That is precisely the right that appel-

lant has by the terms of this contract, whenever appellees fail to meet the lower prices of some other person or corporation."

The court further said:

"It was impossible for the consumer to be oppressed by a monopoly in the price of natural gas *under the terms of this contract,* for by its terms appellant's pipes were open *to every producer* who applied for admission at a *lower rate.*"

In the same case, the court further said:

"Since, under our construction of this contract there was no restraint of trade and no monopoly created injurious to the rights of the public, the cases cited in the brief of counsel for appellees, where there were contracts in restraint of trade or creating monopolies, are not in point."

The court then added:

"No authority can be found, we believe, construing a contract similar to this one as against public policy and void."

It is therefore clear that the court construed the contract as favoring competition and not as stifling competition. All that was said by the court after so holding, with reference to the partial restraint, was wholly *obiter* and inapplicable.

Outside of the Kelley case, just discussed, the cases from Arkansas relied upon by petitioners are cases generally where a business or profession was sold, the contract containing an obligation that the seller would not within a reasonable time enter upon the same business. It is unnecessary to take time to answer those cases, since they have no application.

It is argued (Brief p. 32) that the Supreme Court has held that a monopoly may be granted to a public utility. Said court has not so held. Said court, however, has held that an exclusive franchise may be granted to a public utility. However, in the case of *Citizens Pipe Line Company* v. *Twin City Pipe Line Company* (the latter being the petitioner in this case), 178 Ark. 309, the said Supreme Court specifically held that the petitioner in this case had no exclusive franchise. In substance, the argument of petitioners on this point amounts to a contention that the right to grant an exclusive franchise to a public utility authorizes the public utility to demand of its customers exclusive contracts. We have found no decision so holding. The said argument of petitioners is based upon the assumption that the contract in controversy does not tend to create a monopoly. If a public utility has the right and power to make such an exclusive contract with a customer, then necessarily it would follow that said public utility may demand that condition be included in all its contracts. The inclusion of that clause in a substantial number of its contracts, or even in one in case of a large consumer, excludes the possibility of any competition from outside competitive companies. The evidence tends to show that the gas supply in and around Fort Smith has continually increased ever since the time when the Kelley case, above discussed, arose. If such contracts are valid, then the people of Fort Smith would get no benefit from the discovery of new enormous gas fields at the very door of the community. No matter how much gas a

new company would offer nor at what low price it would be offered, no customer could take gas from the new company if such a contract is valid. It is therefore clear that the contract in controversy does tend to create a monopoly, and hence, under the public policy of Arkansas, is illegal and void.

We have found no law from any jurisdiction which holds that a large manufacturing concern, like the respondent, when confronted with the gas shortgage and the raise of gas prices, has not the constitutional right to use its own efforts to secure a full gas supply in order that it may live. The fallacy of petitioners' contention is made clearer by reference to what is said on page 35 in these words: "Financial considerations, if nothing else, would prevent the utility from developing or contracting for a supply of gas far in advance of present needs, when its large customers could quit it at will." The law, therefore, compels the customer to take? We submit that that doctrine is not found in any adjudicated case. Every public utility in entering upon its business well knows that its customers may take service or they may decline service. They may take service when they will and they may refuse to take service when they wish. The rule contended for by the petitioners in that quotation would make all customers of every public utility the slaves of the public utility.

Counsel urge (Brief p. 36) that respondent, having secured the benefit of the contract in controversy, decided to take its own gas from its own subsidiaries. Counsel overlook the actual facts. The only real bene-

fit received by the respondent under the contract was the construction of the eight-inch pipe. That eight-inch pipe was a benefit to the Twin City Pipe Line Company also. The Twin City Pipe Line Company owed a duty to the respondent to provide sufficient service pipes to give the respondent its gas needs. The District Court in its first opinion in 488 (R. 129) intimated that that relief might have been granted, had the gas supply not been too short. In addition, the construction of that pipe, in the loss of ten cent rate on gas, cost the respondent $45,909.81 and resulted in a clear profit to the Twin City Pipe Line Company of $41,419.99.

In addition to the Constitution and decisions of the Arkansas court above referred to, as showing the public policy of that state—that no monopoly will be tolerated, reference is made to Crawford & Moses' Digest, Sections 7368 to 7373, being the anti-trust law of Arkansas.

In the case of *Woodruff* v. *Berry,* 40 Ark. 252, a case cited by this court in *Gibbs* v. *Consolidated Gas Co.,* 130 U. S. 396, it was held that an agreement between bidders for the job of public printing *which tended to stifle competition,* was illegal and void.

In *Hanauer* v. *Gray,* 25 Ark. 350, the Arkansas court held that a contract based upon Confederate money was void as against public policy.

In *Lindsey* v. *Rottaken,* 32 Ark. 619, a case involving the right of the City of Little Rock to issue warrants, the court held that any transaction against public policy was void, saying:

> "So a contract invading any one of the other interests which the law cherishes, though the thing to be done or promoted is not indictable, and not prohibited by any statute, termed a contract against public policy is likewise void."

In the case of *Patterson* v. *Rogers*, 148 Ark. 222, the Supreme Court of Arkansas upheld a contract between private parties, but the court recognized the principle that if the contract tended to create a monopoly, it would be void, saying:

> "Contracts in partial restraint of trade will be upheld *unless they result in the creation of a monopoly*" (italics ours).

The following cases also support the contention that any contract in violation of public policy is void:

*Jeffrey* v. *Ficklin*, 3 Ark. 227.
*Horn* v. *Foster*, 19 Ark. 346.
*Edwards* v. *Randle*, 63 Ark. 318.
*St. L., I. M. & S. Ry. Co.* v. *Matthews*, 64 Ark. 398.
*Kizer* v. *Texarkana & Fort Smith Ry. Co.*, 66 Ark. 348.

In the Matthews case above, the court held that a contract between a locomotive engineer and a railroad company for perpetual employment of the engineer was against public policy and void.

In *Tallman* v. *Lewis*, 124 Ark. 6, a contract between a board of improvement and a member of the board was held void as against public policy.

It is submitted that the following cases on this point support the contention of the respondent:

*Judd* v. *Harrington*, 139 N. Y. 105.
*People* v. *Sheldon*, 66 Hun. 590.

*Nester* v. *Continental Brewing Co.*, 161 Pa. St. 473.
*Morris' Run Coal Co.* v. *Barkley Coal Co.*, 68 Pa. St. 173.
*Chicago Gas Light Co.* v. *Peoples Gas Light Co.*, 121 Ill. 530.
*Western Union Telegraph Co.* v. *American Union Telegraph Co.*, 65 Ga. 160.

**ADDITIONAL SUGGESTIONS AS TO THE CONTRACT.**

In addition to the above, we respectfully suggest that the contract, which is found on page 4 of petitioners' brief, does not obligate either petitioner to deliver any quantity of gas whatever. The contract was drawn by the president of the petitioners. It expressly provides that the consideration is the undertakings and agreements "*hereinafter set out,*" That language precludes the existence of an obligation by *implication.* Said contract, being drawn by the petitioners, must be more strongly construed against them.

*Marley* v. *Hackler*, 176 Ark. 238.

The Court of Appeals decided the contract on one point only. We think that point is determinative of the rights of the parties hereto. Nevertheless, we feel it our duty to make the suggestion now made. Even if the contract was valid, which we deny, the petitioners could not recover for lack of consideration, and lack of mutuality of obligation as well as remedy.

While we have every confidence in the invalidity of the contract, yet we deem it a duty to suggest to the court that, if the court should be of the opinion that we were mistaken in that respect, then the case would be

one wherein the Court of Appeals had rendered a correct decision, although it had given therefor the wrong reason. Without comment on this suggestion, we submit the following:

*Electric Management Corp.* v. *United Power Co.*, 19 Fed. (2d) 311.

Pomeroy on Specific Performance, 3rd Ed., Sec. 165.

*Hine Co.* v. *Bertaut Co.*, 9 Fed. (2d) 191.

*Cold Blast Transportation Co.* v. *Kansas City Nut Co.*, (C. C. A. 8), 114 Fed. 77.

*Walker* v. *Swift*, (C. C. A. 5), 200 Fed. 529.

*Arizona Edison Co.* v. *Southern Sierras Power Co.*, (C. C. A. 9), 17 Fed. (2d) 739.

*Nakdimen* v. *Atkinson Improvement Co.*, 149 Ark. 448.

*Marble Co.* v. *Ripley*, 10 Wall. 339.

*Engemoen* v. *Rea*, (C. C. A. 8), 26 Fed. (2d) 576.

Wyman on Public Service Corporations, Sec. 331.

## CONCLUSION.

The petitioners in the "Conclusion" of their brief attack the moral right of the respondent to assert the illegality of the contract. It is difficult to understand the moral basis of petitioners' action in that respect. The petitioners in their pleading in case 448, although admitting that they had solemnly assumed the obligations of the Hale contract, yet contended that the same was void; and the Twin City Pipe Line Company, a public utility, succeeded in having the District Court in that case decree that said petitioner, though it had assumed the contract, was not bound thereby.

This court has often held that contracts void as against public policy are struck down, not for the benefit of either party, but for the benefit of the public.

> "In such cases there can be no waiver. The defense is allowed not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced."
>
> *Oscanyan* v. *W. R. Arms Co.*, 103 U. S. 261.

It is therefore respectfully submitted that the cause should be affirmed.

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